Where the whole decision turns on whether the accused had said, "I know where the ammunition is hidden" or whether he had said "I know where I hid the ammunition" then the least the court should expect is that the actual words used by the accused are proved. This was never done.

In the event I came to the view that whatever was stated by the accused that led to the discovery of the ammunition was inadmissible.

What was then left of the case for the prosecution is that the police party recovered a Milo tin containing the ammunition hidden in the undergrowth near to the house where the accused resided with his wife and family.

It was not a case of the accused leading the police party straight to the place where the ammunition was hidden but one where on his directions a comprehensive search was made of what could be likely areas where the ammunition was hidden. The accused either pretended not to know where exactly the rounds of ammunition were or genuinely did not know where exactly they were hidden. There was more than a reasonable doubt as to whether the accused had knowledge of where exactly the rounds of ammunition were and even of whether it was ammunition that he and the police party were looking for. If there was that doubt or even knowledge the question of control or possession of the ammunition simply did not arise.

In the event I was of the view that the prosecution had failed to prove a *prima facie* case on the charge or of any other offence and accordingly acquitted and discharged the accused.

Accused acquitted and discharged

Solicitors: *Karam Singh Veeriah & Co.*

SYARIKAT PERKAPALAN TIMOR v. UNITED MALAYAN BANKING CORPORATION BHD.

[O.C.J. (Mohamed Azmi J.) November 20, 1981]
[Kuala Lumpur – Civil Suit No. 1631 of 1975]

Banking Law – Banker/customer relationship – Duty of bank to customer – Bank liable for debiting on forged cheques – Bills of Exchange Ordinance 1949, s. 24

Evidence – Expert witness – Forgery – Whether self-forgery – Evidence Act, 1950, s. 45.

Banking Law – Banking procedure – Application for and issue of new cheque books.

The plaintiff sued the defendant for money due and owing to the plaintiff as a result of wrongful debiting of the plaintiff's account by the defendant. Two of the defences were that the signatures on the disputed cheques were genuine and that alternatively if they were forged the plaintiff was estopped from alleging forgery. Both parties relied on the testimony of expert witnesses.

Held: (1) if the bank had issued a cheque book meant for the plaintiff firm to an unauthorised person, and the signatures on the cheques were forged to the detriment of the firm, then by virtue of section 24 of the Bills of Exchange Ordinance, 1949, the cheques were wholly inoperative and the bank must be held fully liable for debiting any sum from the firm's account, as it had no authority to make such debit on the authority of forged cheques;

(2) the plaintiff's expert's evidence that the signatures were forged was to be preferred to the defendants' expert's evidence;

(3) the cross-examination of the plaintiff's expert on self-forgery was irrelevant as it was not part of the defendants' pleadings that the sole proprietor of the plaintiff firm was guilty of self-forgery;

(4) even if it was part of the defence, self-forgery was not proved. While the defence expert had been instructed by the defence the court would not suggest he was partial but would nevertheless reject his evidence as self-forgery was admittedly very rare and certain documents had not been examined by the defence expert.

Cases referred to:–

(1) *Ooi Choon Lye* v *Lim Boon Kheng & Ors* F.C.C.A. No. 37/70; *unreported.*

(2) *Francis Hector* v *Emperor* A.I.R. 1937 Allah. 182.

(3) *Haji Mohamed Dom* v *Sakiman* [1956] M.L.J. 45.

CIVIL SUIT.

Lim Kean Chye (*K.S. Tan* with him) for the plaintiff.
Chin Yew Meng for the defendants.

Cur. Adv. Vult.

Mohamed Azmi J.: This is a claim brought by Syarikat Perkapalan Timor (suing as a firm) against its banker, the United Malayan Banking Corporation Berhad, in respect of five cheques totalling $248,103.97. From the pleadings, it is not in dispute that these cheques (Exhibits P.1 to P.5) were made payable to Syarikat Pun and had been debited by the bank against the plaintiff firm's account No. 2159 between July 4 and July 28, 1975. The firm alleges that the relevant cheque book containing these five disputed cheques bearing serial Nos. 213051 ($46,425.00), 213055 ($55,657.32), 213056 ($54,800.35), 213057 ($38,650.10) and 213062 ($52,571.20) was never in fact issued by the bank to the firm and, as such, the firm could not possibly have drawn the said cheques. Under paragraph 10 of the Statement of Claim, it is also pleaded that the plaintiff's signatures on the disputed cheques were forged by some unknown person. The defendant bank having no authority to pay the said cheques, the plaintiff firm now claims for a declaration that the bank is not entitled to debit the firm's account and that the sum of $248,103.97 is due and owing by the bank to the firm. In the Statement of Defence, the bank avers that the relevant cheque book was issued to the firm, and that the firm did knowingly draw the said cheques in favour of Syarikat Pun. It is further averred that the signatures appearing on the said cheques were authorised signatures of the firm and, as such, the firm's account was correctly debited.

From the pleadings and the evidence adduced, it seems to me that there are two main issues for determination. The first issue is whether the "13" series cheque book (hereinafter referred to as 'the relevant cheque book') containing the five disputed cheques was in fact issued to the plaintiff firm. If the answer is in the negative, then it is clear that the firm could not possibly have drawn the said cheques, and as the relationship between a banker and a customer is that of a debitor and a creditor, the bank is liable to the firm for the sums debited. If the answer is in the positive, the second issue is whether the plaintiff's signatures on the said cheques were forgeries. If the debited cheques were forged, then liability on the part of the defendant bank would depend on whether the firm is estopped in law from alleging that they were forgeries by virtue of section 24 Bills of Exchange Ordinance 1949 or, alternatively, it depends on whether the forgeries were caused by

the negligence of the firm or its servants or agents, or the extent to which the firm or its servants or agents is guilty of contributory negligence in the forgeries. It should be noted at this stage, that on the question of forgeries, it is never expressly pleaded by the defendant bank, that they were committed by the plaintiff's firm or its servants or agents for the purpose of cheating the bank. Nor is it pleaded that any of them conspired with any member of the bank staff or anyone else to defraud the bank. On the Statement of Defence, the stand taken by the bank is that the five disputed cheques are not forgeries, and since the signatures appearing on the said cheques were the authorised signatures of the plaintiff firm, the account of the plaintiff was lawfully debited. (See paragraph 2 of Defence). The second line of defence is that, even if the signatures on the disputed cheques were forgeries, the plaintiff firm is estopped from alleging such forgeries. (See paragraph 3). Further, or, alternatively, if the disputed cheques were forged by person or persons unknown, the defendant avers that such forgeries were caused solely through the fault or negligence of the plaintiff firm or its servants or agents. (See paragraph 4). Further, or, alternatively, the plaintiff firm by its own default or negligence, or the fault or negligence of its servants or agents, contributed in full or in part to the alleged forgeries. (See paragraph 5).

On the first issue, the plaintiff's case is that the five disputed cheques had come from the relevant cheque book issued by the defendant bank to a stranger and an unauthorised person which, according to Exhibit P.9, (an authority letter dated July 3, 1975) is one Tong Bit Kin, NRIC No. 1140050. Although Exhibit P.9 bears the rubber stamp of plaintiff firm and the signature of Mr. Sim Siang Yang (P.W. 3), the managing partner and subsequently the sole proprietor of the firm, it is the contention of the plaintiff that Exhibit P.9 is a forged document because Tong Bit Kin is a complete stranger to the plaintiff firm, and the firm had not applied for the relevant cheque book issued to and collected by Tong Bit Kin. If the bank had issued a cheque book meant for the plaintiff firm to an unauthorised person, and the signatures on the cheques were forged to the detriment of the firm, then, I am of the view that by virtue of section 24 Bills of Exchange Ordinance 1949, the cheques are wholly inoperative and the bank must be held fully liable for debiting any sum from the firm's account, as it had no authority to make such debit on the authority of forged cheques. On this particular issue, the bank is relying on Exhibit P.9 and the evidence of the bank officer, Koh Hwa Kwee (D.W.1), to prove that the relevant cheque book had been issued to the plaintiff firm. According to Mr. Koh, on July 3, 1975, he remembers having seen the authority letter Exhibit P.9. It was given to him by Tong Bit Kin personally. According to him, besides the authority letter, Tong Bit Kin also handed to him an application letter from the plaintiff firm for the issue of a new cheque book, but the application letter is now missing. To determine whether Mr. Koh is telling the truth, it is necessary to consider the evidence of Mr. Tan Ngee Tiong (D.W. 7), who is conversant with the banking system adopted by the defendant bank in July 1975. According to Mr. Tan, a customer could apply for new cheque book either by means of cheque application slip or by letter, although in the application slip as shown in Exhibit AB. 347 in the second Agreed Bundle of Documents, it is printed that "as a means of preventing possible fraud, customers are requested to use this printed order form when requiring a new cheque book". As regards collection of new cheque book by a third party, Mr. Tan testifies that the bank is very cautious and insists that the customer or accountee should give the third party not only a cheque application slip, but also a letter of authorisation to collect the cheque book. The letter of authorisation is a pre-printed form like Exhibit P.9 and that is the only form accepted by the bank. If a customer requested by ordinary letter for new cheque book to be collected by third party (as is alleged by Mr. Koh in the present case), the defendant bank would also insist for the cheque application slip and the bank would get confirmation of such request by phone. It is significant to note, firstly, that when Mr. Koh handed the relevant cheque book to third party Tong Bit Kin, no cheque application slip was insisted upon and, if application by ordinary letter had been presented, no confirmation was made for such request. Secondly, I note that by cheque application slip dated July 9, 1975 (Exhibit D.26), five new cheque books were issued to the plaintiff firm, i.e. only five days after the first disputed cheque (Exhibit P.1) had been presented and passed for payment and only one day prior to the presentation of the second disputed cheque (Exhibit P.2), and yet the bank officers say that they had no reason to be suspicious when the third to fifth cheques were presented for payment. From the evidence of bank officials called by the defendant, when the five disputed cheques were presented for payment on the various dates in July 1975, each cheque was verified by two officers before payment was made. Thus, cheques Exhibits P.1 and P.5 were passed and verified by Mr. Ng Kon Leong (D.W.2) and Mr. Khoo Mui Sang (D.W.4). Cheque Exhibit P.2 was passed and verified by Mr. Khoo and Mr. Kuan Pak Lai (D.W.6); cheque Exhibit P.3 was by Mr. Khoo and Mr. Lee Keat Heong (D.W.5); and cheque Exhibit P.4 was by Mr. Ng and Mr. Lee. Even accepting their evidence as completely true, it is clear that what they meant by verification of the cheques was nothing more than checking the particulars on the bills and visual comparison of the signature with that on the specimen signature card Exhibit P.13. There was no other examination to eliminate forgeries or even a simple phone call to confirm the issue of the relevant cheque book to the plaintiff firm or to enquire why the acknowledgment slip of the relevant cheque book had not been returned to the bank as was the usual practice of the plaintiff firm and expressly encouraged by the defendant as printed on the slip itself. It is also unfortunate that none of the bank officers is able to identify the persons who presented the disputed cheques which, I am sure, could have helped the police in their investigation to trace the actual forger. Further, I note that Mr. Tan found Exhibit D.26 in the course of his search. This was the last genuine application for a new cheque book from the plaintiff. If so, it is reasonable to assume that the plaintiff could not have applied for a new cheque book by letter on July 3, 1975 – a mere six days earlier. As such, the story of Mr. Koh (D.W.1) about the missing application letter cannot reasonably be true. In my

view, there was simply no application letter submitted on July 3, and that Mr. Koh issued the relevant cheque book to Tong Bit Kin merely on the strength of Exhibit P.9 which is an authorisation letter for collection and receipt of cheque book by a third party. If there had been such an application letter submitted on July 3, the bank officers concerned would have been put on immediate query when the third cheque was presented for payment on July 17 as to why the plaintiff again applied for new cheque books by cheque application slip on July 9. To my mind, the fact that defendant bank never contacted the plaintiff about Exhibit D.26 and never obtained any confirmation of the alleged application by letter on July 3, strongly give rise to the inference that the bank never in fact received through Tong Bit Kin an application letter together with Exhibit P.9 as suggested by Mr. Koh. The story about the alleged application letter being missing is too far-fetched and must be rejected under the circumstances. In fact, on being recalled, Mr. Ng Kon Leong (D.W.2) admits to what I consider to be the truth, that is, he would not know if such an application really exists. I think this must apply to the other bank officers as well except for Mr. Koh himself. Having considered the evidence as a whole, I find the story about the application letter of July 3 is concocted by Mr. Koh for the purpose of concealing his failure to comply with the procedure laid down by the bank regarding the issue of cheque book to third parties as, described in the testimony of Mr. Tan. In my view, the search team led by Mr. Tan could not find the application letter, because there was no such document in the first instance. In this case, the finger of suspicion seems to be pointing more strongly at Mr. Koh than at anybody else, as being in league with Tong Bit Kin and Syarikat Pun, in the scheme to cheat the bank by siphoning the plaintiff's fund to the said Syarikat. When questioned by the court, Mr. Tan admits that in the course of his investigation, he did not recover any acknowledgment receipt slip from the plaintiff in respect of the relevant cheque book. The reason is quite obvious. It was never sent back by Tong Bit Kin and his gang who, within 24 days, managed to siphon nearly $250,000/– from the plaintiff's account in the bank to Syarikat Pun by means of forged cheques. Further, Mr. Tan also admits that in most cases, application for new cheque books are by the customers or accountees themselves and the cheque books are issued to them direct. But a customer is not allowed to authorise a third person to apply for new cheque book and also to collect it, which is precisely what had happened in the present case. Mr. Koh purportedly allowed plaintiff firm to authorise a third party (Tong Bit Kin) to apply for new cheque book and at the same time to collect the cheque book. Mr. Tan further testifies that if the customer had lost his cheque application slip or if it were lost in the post, the bank would allow him to apply for cheque book by letter, and in any other circumstances, application by letter would not be allowed. Thus, the falsity of Mr. Koh's evidence is finally exposed completely by Mr. Tan's testimony, in that Mr. Koh's story that Tong Bit Kin handed him two documents on July 3, 1975 cannot possibly be true. By the defendant bank's own procedure, the plaintiff firm, irrespective of Exhibit P.9, could not have asked Tong Bit Kin to apply for a new cheque book by letter and at the same time asked him to collect the cheque book. There is also no evidence that the plaintiff has lost his cheque application slip to enable him to apply for a new cheque book by letter through a third party. On balance of probabilities, I reject Mr. Koh's evidence that he issued the relevant cheque book to Tong Bit Kin on the strength of two documents, viz. an application letter from plaintiff firm for new cheque book and an authorisation letter to collect the same (Exhibit P.9). In my view, if at all, Mr. Koh issued the relevant cheque book merely on the strength of Exhibit P.9, which is admittedly an authority letter to collect new cheque book and receipt acknowledgment as distinguished from an application for a new cheque book. It is my finding that Mr. Koh is not telling the truth when he says that Tong produced to him an application letter from plaintiff firm for a new cheque book apart from Exhibit P.9, and that after checking the signatures of both documents against the specimen signatures kept by the bank (Exhibits P.13 and P.13A) and when he was satisfied that both documents were genuine, then only he issued the relevant cheque book to Tong. On balance of probabilities in the evidence, I am not satisfied that Tong Bit Kin ever produced any such application letter for a new cheque book from the plaintiff firm as alleged. Mr. Koh testifies that such application letter is normally kept in the strong room of the bank and yet the defendant bank is unable to produce this important document on the ground that it is found missing or misplaced, strangely enough after a report was made by Mr. Sim (P.W.3) to the bank regarding the disputed cheques on August 8, 1975. It is inconceivable that such an important document allegedly kept in the strong room could have disappeared into thin air just after the validity of the cheques was challenged by the plaintiff firm. According to the evidence of Mr. Sim, which I accept, he discovered about the five disputed cheques on checking the statement of accounts for July 1975 which he received on August 8, 1975. On the same day, he went to the main office of the defendant bank and reported the matter to the bank manager; and, later, he lodged a police report. In this case, as already mentioned earlier, it is never remotely suggested by the defendant bank that Mr. Sim had conspired with Mr. Koh or any of the bank officials to cheat the bank. To my mind, the mysterious disappearance of the alleged application letter on August 8, 1975 – a matter of just over a month from the date of its alleged receipt by Mr. Koh on July 3, 1975 – is a concoction to defeat the plaintiff's claim. From the unchallenged evidence of Mr. Sim, except when the plaintiff's account was first opened in 1974, the practice adopted, whenever the firm requires a new cheque book, is to use the cheque application slip; and each time the firm is supplied with a new cheque book, it would send back the acknowledgment slip provided by the bank before using the cheques. In my view, it is common knowledge that the practice adopted by the plaintiff firm as described by Mr. Sim is the normal banking procedure in this country between customers and bankers in the application for and issue of new cheque books. From Exhibit P.19 – the last authorised cheque issued to the plaintiff firm prior to July 9 – I find the application slip is still unused and undetached. On balance, I am therefore satisfied that the plaintiff firm never applied for a new cheque book

on July 3, 1975. In this case, not only is the defendant bank unable to produce any application by the plaintiff firm for the relevant cheque book either by application slip or ordinary letter, but also the bank fails to produce the acknowledgment slip for the relevant cheque book. Having regard to the evidence as a whole, I find on balance of probabilities that the stranger Tong Bit Kin never gave any application letter from plaintiff firm to Mr. Koh before the relevant cheque book was issued, and in the absence of of any evidence to connect Tong with the plaintiff firm or with any of its servants or agents, it cannot be said that the relevant cheque book had been issued to the plaintiff firm. As admitted by Mr. Koh, the bank would accept Exhibit P.9 for collection of cheque only, and it is not an application for new cheque book from a customer. In the event, I hold that the plaintiff firm could not possibly have drawn the five disputed cheques. On this ground alone, the plaintiff firm's claim should succeed as the defendant bank has no authority to debit the firm's account in the absence of proof that the five disputed cheques had been applied by and issued to the plaintiff. Based on the acknowledgment receipt slips, none of the new cheque books issued to the plaintiff in July 1975 refers to the relevant cheque book, i.e. the "13" series cheque book. In the circumstances, I also hold that the acknowledgment by the stranger Tong Bit Kin vide Exhibit P.9 cannot be imputed as a valid acknowledgment by the plaintiff firm. In this case, it is not seriously challenged that Tong Bit Kin is not a fictitious person. According to the evidence of Inspector Kwa Bee Eam (P.W. 1) who investigated the police report lodged by Mr. Sim regarding the forged cheques, there is such a person as Tong Bit Kin with NRIC No. 1140050, but up to date of the hearing his whereabout is unknown. As regards Syarikat Pun, in whose name the five cheques were made payable, the Inspector also found that it is solely owned by one Pun Shyh Yun NRIC No. 1728161. It would appear that Pun Shyh Yun is merely a construction labourer. According to the Inspector, Syarikat Pun cannot be found at the address given in the business registration. There was no such Syarikat at that address, but a hairdressing saloon was occupying the said address. In the circumstances of the present case, I accept the evidence of Mr. Sim that he never saw Exhibit P.9; he did not know anyone by the name of Tong Bit Kin and nor did he authorise Tong to collect the relevant cheque book on the strength of Exhibit P.9. In view of my finding on the first issue, it might not even be necessary for me to deal with the question of forgeries raised in the second issue relating to the five disputed cheques – see judgments of Ong C.J., Gill F.J. and Raja Azlan F.J. (as he then was) in *Ooi Choon Lye v. Lim Boon Kheng & 2 Ors.*(1)

On the second issue, the five disputed cheques (Exhibits P.1 to P.5) and the authority letter (Exhibit P.9) have been sent for examination to Mr. Phan Kok Chai (P.W. 2), a Government document examiner. Mr. Phan is attached to the Department of Chemistry Petaling Jaya, and he has been a document examiner for 19 years and his testimony as an expert in examining documents has been accepted in Magistrate's Courts and High Courts in this country since 1959. According to the expert evidence of Mr. Phan, he had examined the five disputed cheques and, in particular, he examined the signatures and handwriting on the documents. As regards signatures and handwriting, he examined them against the specimen signature and the specimen handwriting of Mr. Sim, who is the authorised signatory of the plaintiff's account at the relevant time. He also checked them against the signatures and handwriting on the ten genuine cheques drawn by the plaintiff firm which were supplied to him by Inspector Kwa. (See Exhibit P.18). He was requested to examine these documents and to report on whether the handwriting and signatures were written and signed by the writer of handwriting and signature samples in Exhibits P.6A, P.6B and P.7A to D – the writer being Mr. Sim. After examining and comparing these documents, Mr. Phan found that the handwriting on the five disputed cheques differ from the specimen handwriting of Mr. Sim not only in line quality, which is fluency, but also in formations and proportions of the letters and alignment of the writings. He also found the signatures on the disputed cheques differ from the bank specimen signature in Exhibit P.13 in line quality and as well as formations and proportions of the letters. In arriving at his conclusions and opinion, Mr. Phan used various photographic equipment and microscope (see his first report on the five disputed cheques Exhibit P.16). In effect, he is of the opinion that the evidence is consistent with the handwritings and signatures of the five disputed cheques not being written and signed by Mr. Sim. As regards the authority letter Exhibit P.9, Mr. Phan was requested to examine the signature and the rubber stamp impression on the document. On comparing the signature with Mr. Sim's specimen signature with the bank in Exhibit P.13, he found there is a difference, in that in Exhibit P.9 the signature has no 'dot' whereas Mr. Sim's specimen signature has a 'dot' as part of his signature. (See second report Exhibit P.14). In respect of the rubber stamp chop on the authority letter (Exhibit P.9), even Mr. Davies, the expert witness called by defendant bank, agrees that it is exactly the same as used in the five disputed cheques, but it is different from the chop on the 30 genuine cheques (Exhibit P.29) and other documents which he had examined. It should be noted that in this case although Mr. Davies disagrees with Mr. Phan's opinion in the first report regarding signatures and to a certain degree the handwriting on the five disputed cheques (see Exhibit P.16), as far as rubber stamp is concerned, he agrees with the opinion of Mr. Phan. From the evidence of both expert witnesses, I come to the conclusion that even the rubber stamp on the authority letter and the five disputed cheques are forged. The rule admitting expert evidence can be found in section 45 of the Evidence Act which provides:

> "(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identify or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> (2) Such persons are called experts."

In this case, having regard to the evidence, I accept Mr. Phan's opinion that both the five disputed cheques and the authority letter, are not genuine. As expected, no honest handwriting expert can be 100% certain of his opinion and Mr. Phan is no exception. Although he cannot be absolutely

certain, based on his reasonings and examination, and having regard to his vast experience locally as document examiner and his complete impartiality in the present dispute – his report on the five disputed cheques being prepared in the course of police investigation – it is my finding that the handwriting and signature on the said cheques are not that of Mr. Sim and, as such, they are forgeries. It is true that the signatures on the disputed cheques and that of the bank specimen all have 'dots' and, as such, it can be argued that they are not different as far as 'dots' are concerned. But Mr. Phan's conclusions and opinion on this point are not based merely on the absence or presence of 'dots'. He also finds the signatures and handwriting on the disputed cheques are different in dominant features, namely, in quality, formation and proportion not only as compared to Exhibit P.15 (the 10 genuine cheques previously drawn by plaintiff firm) but also from specimen signatures and handwriting of Mr. Sim taken by Inspector Kwa on August 9, 1975 in the course of police investigation (Exhibit P.6A and B) and also those taken by the Inspector on September 11, 1975 at the request of Mr. Phan (Exhibit P.7A to D). With regard to Exhibit P.9, Mr. Phan testifies that even ignoring the absence of 'dots' in the signature, his opinion is the same as stated in his second report Exhibit P.14. It should be noted that Mr. Phan is not called as an expert witness to identify the forger, but to give his expert opinion whether the two sets of documents are forgeries. In my view, the lengthy cross-examination of Mr. Phan on the possibility of the documents being self-forged by Mr. Sim, by disguising his own signature and handwriting, is irrelevant as it is not part of the defendant's defence on the pleading that Mr. Sim is guilty or suspected of being guilty of self-forgery. Even if that defence had been expressly pleaded, there is no sufficient evidence to support it. The forgeries were reported to the police by Mr. Sim himself, and investigation was carried out by the police. I find there is not not an iota of evidence that Mr. Sim or the plaintiff firm is connected in any way with Tong Bit Kin, Pun Shyh Yun or Sharikat Pun, who are directly or indirectly connected with the forgeries. It is also significant to note that Mr. Koh (D.W.1) does not even know which bank officer is responsible for issuing form P.9 – the pre-printed authorisation letter. He does not know also who can provide that information. In the face of such evidence, Mr. Sim's testimony that he had never used or signed P.9 and never received the relevant cheque book should be readily accepted by the court, and it would strengthen Mr. Phan's opinion that these documents are forgeries. In this case, the defence has called its own handwriting expert in the person of Mr. Derrick James Davies (D.W.3). From his testimony, there is no doubt that Mr. Davies is an experienced forensic handwriting expert. His comments on Mr. Phan's opinion can be found in the following passage of his testimony in cross-examination:

"I disagree with Mr. Phan's opinion as given at page 3 of Exhibit P.16. Technically, the first report, the handwriting which I call 'detail' – I agree is a forgery, but the second half regarding signature I disagree. My opinion is that the five signatures on the five cheques (P.1 to P.5) are genuine. That is what I meant yesterday. But the 'detail' on the cheques are disguised and therefore technically a forgery. I will go further by saying that the person who wrote the 'detail' on the five cheques disguised the natural style and that person is also the person who signed the cheques."

Thus, the sum total of Mr. Davies' opinion in his report Exhibit P.30 and testimony is that, although the signature and handwriting in the five disputed cheques are different from those of Mr. Sim, they are not in fact forgeries. In other words, he agrees they are forgeries, but he goes one step further by expressing the type of forgery, namely, that this is a case of self-forgery which, if true, would mean that it was Mr. Sim who wrote and signed the five cheques, but he intentionally disguised them by not following his natural and normal style, so that they would not be recognised. However, counsel for both parties agree that the last sentence in the fourth paragraph at page 5 and certain words in the penultimate paragraph at page 4 of Mr. Davies' report should be expunged, as he has apparently gone too far in giving inadmissible evidence on the motive of the forgerer instead of confining himself to comparison of handwriting and to opinion on the handwriting itself. Unlike Mr. Phan who prepared the first report Exhibit P.16 in the course of police investigation, Mr. Davies has all along been instructed by solicitors for one of the parties in the present dispute, and as stated in Identification of Handwriting and Cross-examination of Experts by M.K. Mehta at page 53:

"It must be said generally that expert evidence produced by an interested party may have a certain amount of unconscious bias in favour of the party. But if the difference of opinion between two expert witnesses is purely of an essential character, the Court must accept one opinion or the other without characterising the opposite opinion as partial."
(See *Francis Hector v. Emperor*[(2)])

In his evidence, Mr. Davies agrees that self-forgery is very rare, and without suggesting Mr. Davies is partial, I have given cautious and anxious consideration to the opinion given by both the expert witnesses. Coupled with their long experience as document examiners and the rest of the evidence adduced in this case, I accept the opinion of Mr. Phan that both the handwriting and signature on the five disputed cheques and as well as the signature on the authority letter Exhibit P.9 are forgeries. To be fair to Mr. Davies, he agrees that the handwriting on the disputed cheques are forgeries, but I do not accept his opinion of self-forgery as regards the handwriting on the cheques and yet at the same time holding the signatures as genuine. In my view, it is improbable for a forger to forge his own handwriting on the document without forging his own signature as well. Further, I do not accept Mr. Davies' opinion on self-forgery, because the issue is neither pleaded and nor is it supported by the rest of the evidence on the first issue. As stated earlier on, I also find his evidence that the signatures on the five cheques as genuine must be rejected in favour of Mr. Phan's opinion. As he himself admitted, self-forgery is very rare. In my view, if Mr. Sim were to forge the cheques, I fail to see why he took the trouble to disguise only the handwriting but not the signatures. To my mind, Mr. Phan's evidence that both the handwriting and the signatures on the cheques are forged when compared to the specimen signature in Exhibit P.13 is more reliable, and his opinion is consistent with the other evidence in thise case, in that Mr. Sim simply had no opportunity to commit a forgery because the relevant cheque book was never issued to him or to the plaintiff firm. In short, evidence of opportunity for him to commit a crime is absent. Whereas Mr. Davies' omission to compare the disputed sig-

natures with the bank specimen signature in Exhibit P.13 (though he made comparison with Exhibit D.29 – thirty genuine cheques drawn by plaintiff firm over a period of time) would tend to render his evidence on signatures less reliable than Mr. Phan, who made comparison not only with the specimen signature card but also with 10 genuine cheques previously drawn by plaintiff firm, and sample signature and handwriting of Mr. Sim taken by the police. But neither the original of authorisation letter Exhibit P.9 nor the specimen signature card Exhibit P.13 were sent to Mr. Davies in England for comparison and examination. The first time he saw them was in this court.

In this case, it is not in dispute that the five disputed cheques were presented for payment at the head office of defendant bank on the various dates in July 1975 as contained in Exhibit P.1 to P.5, and debited against plaintiff's current account No. 2159 which had been actively operating since July 19, 1974 until it was finally closed on August 14, 1975 as a result of the present dispute. (See AB.20 and AB.36 in the first Agreed Bundle). As can be seen from the statement of accounts, it was not a dormant bank account. Being a shipping agent, the plaintiff firm's account was active and the credit balance even touched $1,000,000/– in May 1975. In my view, it is stretching one's imagination too far to infer that such a bank account was established for the purpose of cheating the defendant, merely because Mr. Sim did not check the bank balance from the cheque book's counterfoils in the usual pattern in July 1975. It is true that Mr. Sim was sued in the High Court at Kuala Lumpur by Wah Siong Shipping Company regarding payment of commission to a person in Singapore, but that was after he had left Wah Siong – his former employer and joined the plaintiff firm. Further, he was sued only for the sum of $17,000/– and the claim was dismissed. There is also no evidence that Mr. Sim or the plaintiff firm was in financial difficulties in July 1975 when the five disputed cheques were forged and presented for payment. Under these circumstances and based on the expert evidence of Mr. Phan, I am satisfied that both the signature and handwriting on the disputed cheques are not that of Mr. Sim nor is he responsible for forging the same. In the absence of evidence that Mr. Sim knew Tong Bit Kin to whom the relevant cheque book was handed by the defendant bank, or that he was in any way connected with Pun Shyh Yun or Syarikat Pun, to whom the forged cheques were made payable, or that either he or someone he knew was the person who presented the cheques for payment, apart from the question of failure to plead self-forgery, I reject the defendant's contention that Mr. Sim had anything to do with the forgeries of the authority letter Exhibit P.9, and the five disputed cheques. On balance of probabilities in the evidence, the plaintiff's claim must succeed. In his submission, learned counsel for the defendant complained that the plaintiff has not pleaded negligence and that to put the defendant bank on trial is a red-herring. In the first place, I agree that on the pleading the plaintiff's cause of action is not based on negligence although the pre-writ correspondence and the pre-trial affidavits indicate that negligence on the part of the bank was being considered and expressly mentioned. This court is, however, bound to decide the present dispute on the pleadings. (See *Haji Mohamed Dom v. Sakiman*[3]). The cause of action is for money due and owing from the defendant to the plaintiff, as a result of wrongful debiting of plaintiff's account by the defendant bank. To determine the first issue, it is in fact the defendant who called officers from the bank to refute the plaintiff's allegations that the plaintiff firm never bought or received the relevant cheque book which contained the five disputed cheques. As such, it is not correct for the defendant to complain that the whole bank has been unnecessarily put on trial.

Since I am satisfied beyond reasonable doubt that the five disputed cheques and the authorisation letter are forgeries, I do not think I need go through in detail the alternative defence raised in the Statement of Defence. In any case, they have not been seriously pursued by defendant counsel either in evidence or in his submission. Suffice for me to say that there is no evidence to support that the forgeries were perpetrated as a result of negligence on the part of the plaintiff firm or its servants or agents; nor is there evidence that any of them was guilty of contributory negligence. As regards the plea under section 24 of the Bills of Exchange Act 1949, I do not think that provision can help the defendant in the circumstances of the present case. There is no evidence of negligence or any other conduct on the part of the plaintiff firm or its servants or agents to warrant a ruling that the plaintiff is estopped or precluded from setting up a forgery or want of authority under section 24. The five forged cheques are wholly inoperative, and the defendant bank is not entitled to debit the sum claimed from the plaintiff's account.

For the above reasons, I give judgment for the plaintiff in terms as prayed in paragraph (i), (ii) and (iii) of Statement of Claim, except that in prayer (ii), the interest should be at 10.5% instead of 12%, which is the interest rate for overdraft according to the evidence of Mr. Koo Mui Sang (D.W.4).

Claim allowed.

Solicitors: *Syarikat K.S. Tan; Allen & Gledhill*

LETCHEMY ARUMUGAN v. N. ANNAMALAY

[O.C.J. (Wong Kim Fatt J.C.)
December 8 & 9, 1981 and April 2, 1982]
[Seremban – Civil Suit No. 251 of 1978]

Contract – Sale of land – Fraudulent misrepresentation – Rescission – Claim for damages and interest – Defendant counter-claiming for specific performance and damages – Contracts Act 1950 (Revised 1974), ss. 16 & 17 – Specific Relief Act, 1950 (Revised 1974), ss. 27 & 37 – Evidence Act, 1950, s. 111 – National Land Code, 417.

In this action the plaintiff, an illiterate Indian woman rubber tapper, claimed against the defendant a declaration and rescission of an agreement of sale dated January 7, 1977 and other documents executed by her, on the ground of false or fraudulent misrepresentation on the defendant's part relating to her land Lot 736, District of Port Dickson. She also claimed damages and interest. The defendant, a housing developer, denied the claim and counter-claimed for specific performance and damages. The parties listed six issues for determination by the court.